IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1193

MICHAEL R. STEARSMAN,

Petitioner,

—v.—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

JOEL M. GORA
c/o American Civil Liberties Union
22 East 40th Street
New York, New York 10016

EDWARD A. BRILL
1185 Avenue of the Americas
New York, New York 10036

Attorneys for Petitioner

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Petitioner Michael R. Stearsman respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered on November 25, 1977, dismissing petitioner's action for a declaration that his 1963 court-martial conviction for adultery was void and unconstitutional, and for related relief based on the continuing effects of that conviction upon petitioner's military career.

OPINION BELOW

The opinion of the United States Court of Claims is not yet reported; it is set forth in the Appendix, infra, at pp. 1a-4a.

JURISDICTION

The judgment of the Court of Claims was entered on November 25, 1977; this Court's jurisdiction is invoked under 28 U.S.C. §1255.

QUESTION PRESENTED

Whether the exercise of court-martial jurisdiction over petitioner in 1963, resulting in a conviction for adultery, was void and unconstitutional where the alleged offense was not "service connected," O'Callahan v. Parker, 395 U.S. 258 (1969), and where petitioner has served continuously in the military since that conviction?

STATUTORY PROVISIONS INVOLVED

Article 134, Uniform Code of Military Justice, 10 U.S.C. §934:

> § 934. Art. 134. General Article
>
> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed

> forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. (Aug. 10, 1956, ch. 1041, 70A Stat. 76)

STATEMENT OF THE CASE

Petitioner is a non-commissioned officer with the United States Air Force, and has been continuously in the Service since 1956. Early in 1963, then a Staff Sergeant stationed at Eielson Air Force Base in Alaska, petitioner was convicted by court-martial of violating Article 134 of the Uniform Code of Military Justice by "having had sexual intercourse with a married woman not his wife." (App., infra, p. 1a).

The alleged offense occurred some 25 miles from the military base, in a home in a regular civilian residential section of Fairbanks, Alaska. Petitioner was lawfully off-duty at the time, properly away from the base, and wearing civilian clothes. The woman

involved in the alleged offense was a friend of petitioner's. She was not employed at Eielson AFB in a military or civilian capacity and had no connection with the military base, except she was married to an Air Force sergeant also stationed at Eielson, but assigned to a different unit than petitioner.

The specification of charges against petitioner under UCMJ Article 134 contained no allegation that the alleged conduct was connected to plaintiff's military service or otherwise had military significance. 1/ At the court-martial, the prosecution called as a witness the woman with whom petitioner allegedly had sexual relations. The defense attorney's objection that she was entitled to be informed of her Fifth Amendment rights prior to any questioning concerning the offense was overruled by the presiding military law officer, although defense counsel properly pointed out that the alleged offense was also a violation in the State of

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1/ Petitioner was tried at the same time on a charge of violating UCMJ Article 130 for an unrelated offense. His conviction for that offense was subsequently disapproved and set aside on review by the Headquarters, Alaskan Air Command.

Alaska and that the military proceedings could subsequently be subpoenaed by civilian courts. It was stipulated at the trial that the woman's consent to sexual relations with petitioner was not an issue in the case. Both petitioner and the woman were over the age of 21 at the time.

The court-martial found petitioner guilty of all charges and specifications. He was sentenced to dishonorable discharge, forfeiture of pay and allowances, and three years' confinement at hard labor with reduction in rank to Airman Basic, although in seven previous years of Air Force service he had been regularly promoted and was never subjected to any court-martial charges.

As a result of the conviction, petitioner was (as finally determined after command appellate review) stripped of his sergeant's rank, reduced to the rank of Airman Basic, confined for five months and fourteen days, and compelled to forfeit pay and allowances during his confinement. Petitioner returned to duty in late 1963, and again rose through the ranks to his present position of Master Sergeant.

On or about August 3, 1969, petitioner applied to the Air Force Board for Correction of Military Records on the basis of O'Callahan v. Parker, 395 U.S. 258 (1969), for correction

of his military records to have them show the overturning of his court-martial conviction and his entitlement to promotions and payment of amounts found to be due as a result of such correction. The application was denied without hearing on September 4, 1969; a further application was similarly denied without hearing on October 9, 1969.

Petitioner filed this suit in the Court of Claims in May 1975, seeking a declaration that his conviction was unconstitutional and void, expungment of the conviction from his military records, restoration of his proper grade and rank, and collection of back pay and other monetary relief. 2/ Upon cross-motions for summary judgment, the Court of Claims granted the defendant's motion and ordered the action dismissed on November 25, 1977.

The Court rejected petitioner's argument that the court-martial was without jurisdiction to try him in 1963 for an offense which was not service-connected under O'Callahan v. Parker,

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2/ Jurisdiction to grant the requested relief was present under 28 U.S.C. §1491. See Schlesinger v. Councilman, 420 U.S. 738, 747-48, 752 (1975); Gross v. United States, 209 Ct. Cl. 70, 531 F.2d 482 (1976).

395 U.S. 258 (1969), relying on its own previous holdings that O'Callahan was not retroactive. Augenblick v. United States, 206 Ct. Cl. 74, 509 F.2d 1157 (1975), cert. denied, 422 U.S. 1007 (1976); Gross v. United States, 209 Ct. Cl. 70, 79-80, 531 F.2d 482, 488 (1976) (App., infra, p. 3a), 3/

REASONS FOR GRANTING THE WRIT

1. The issue presented by this case is whether the exercise of court-martial jurisdiction over the petitioner, resulting in a 1963 conviction for adultery, was void and unconstitutional under the principles announced in O'Callahan v. Parker, supra, limiting trial

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3/ In the Court below, the petitioner also advanced the separate claim that his court-martial conviction for adultery violated the constitutional right of privacy relating to sexual conduct between consenting adults. Two judges below ruled that petitioner had waived this claim by not presenting it as a defense to the court-martial or on command review from the conviction. The third member of the panel took the position that the waiver ruling was inappropriate, but that on the facts of this case the sexual privacy claim should be rejected on the merits. (App., infra, pp. 3a-4a). The petitioner does not seek review of these aspects of the decision below.

by military court-martial to crimes which are service connected. The Court of Claims held that O'Callahan had no retroactive application to petitioner, and therefore dismissed his action. 4/

4/ The Court below did not reach the question of whether the offense for which petitioner was convicted by court-martial was service connected under this Court's decisions in O'Callahan v. Parker and Relford v. Commandant, 401 U.S. 355 (1971). Since we do not believe there can be any serious argument that the alleged off-base, off-duty adultery with the wife of a serviceman was service-connected, and the government did not press this point below, we do not raise this point as a separate question for review.

The military courts have consistently refused to find service connection present merely because the victim of an off-base crime of a sexual nature was a military dependent. See e.g., United States v. Henderson, 18 U.S.C.M.A. 601, 40 CMR 313 (1969); United States v. McGonnigal, 19 U.S.C.M.A. 94, 41 CMR 94 (1969); United States v. Shockley, 18 U.S.C.M.A. 610, 40 CMR 322 (1969). Of course, this case involved sexual conduct between consenting adults, and therefore presented even less justification for military jurisdiction than the cited cases where military dependents were victims of a crime.

The retroactive application of O'Callahan v. Parker was squarely presented for decision in Gosa v. Mayden, 413 U.S. 665 (1973), but was not conclusively resolved by the divided opinions of the Court:

(1) Four justices, the plurality opinion being written by Mr. Justice Blackmun, held that O'Callahan was not to be applied retroactively;

(2) Three justices joined in a dissenting opinion, written by Mr. Justice Marshall, that O'Callahan must be applied retroactively because O'Callahan had decided that there was no constitutional jurisdiction in courts-martial to adjudicate non-service-connected offenses;

(3) Mr. Justice Rehnquist agreed that O'Callahan was based on lack of jurisdiction and, under controlling precedents, O'Callahan would have retroactive application, but voted to overrule O'Callahan;

(4) Mr. Justice Douglas did not reach the merits in Gosa because he believed that the issue was simply whether appellant's failure to raise the O'Callahan issue in the military courts had made the matter res judicata.

Thus, on the precise issue presented by this case, whether O'Callahan is a jurisdictional decision to be applied retroactively, the opinions of the Court in Gosa v. Mayden resulted in a 4-4 split. 5/

While the Court of Claims has considered that Gosa v. Mayden created a "binding precedent" on the issue of O'Callahan retroactivity, Augenblick v. United States, 206 Ct. Cl. 74, 509 F.2d 1157 (1975), cert. denied, 422 U.S. 1007 (1976), and therefore made no independent examination of the question here, the courts of appeals which have considered the question have uniformly viewed the issue as unresolved by Gosa. See Brown v. United States, 508 F.2d 618, 623-24, 644-46 (3rd Cir. 1974); Williams v. Froehlke, 490 F.2d 998 (2d Cir. 1974) ("Since O'Callahan was not overruled, Mr. Justice Rehnquist must be counted with the dissenters

5/ It is significant that Mr. Justice Rehnquist did not limit his concurring opinion to his belief that O'Callahan should be overruled, but mentioned it only in connection with one of the two cases before the Court. As to the other case, he stated that, "even if O'Callahan were followed," any crime committed by a member of the armed forces during a period of declared war was service-connected and could be tried by court-martial. 413 U.S. at 692.

in Gosa as believing that O'Callahan is retroactive," Id. at 1001); Lichtenstein v. Schlessinger, 495 F.2d 1382 (9th Cir. 1974).

The retroactive application of O'Callahan is an issue undoubtedly of major constituitonal importance, an issue which the splintered opinions in Gosa leave without definitive resolution by this Court. We urge that the Court accept this case for review in order to resolve this issue, and respectfully suggest that the dissenting opinion of Mr. Justice Marshall in Gosa contains the more persuasive analysis of the issues, and should be adopted by the Court. Under that view, O'Callahan involved jurisdictional competency and defined the constitutional limits of adjudicatory power of the military courts. As such, O'Callahan must be applied retroactively. See Robinson v. Neil, 409 U.S. 505 (1973); United States v. United States Coin and Currency, 401 U.S. 715 (1971).

The Gosa plurality's use of the three-pronged test developed in Stovall v. Denno, 388 U.S. 293 (1967), to defeat retroactive application of O'Callahan depends upon its view that O'Callahan was essentially a procedural, not a jurisdictional, ruling. This view misconstrues the holding in O'Callahan,

which was clearly based, "on the constitutional limits of the military's adjudicatory power over offenses committed by servicemen," (Gosa v. Mayden, 413 U.S. at 694, Marshall, J., dissenting). We urge that the Court reconsider this quesiton left unanswered in Gosa, and definitely resolve it in accordance with the view of Mr. Justice Marshall.

2. Even if Gosa v. Mayden can be read as precluding the claimants there from relying on the O'Callahan decision to challenge their pre-1969 court-martial convictions, however, that ruling is not necessarily dispositive in this case. Petitioner here, unlike the claimants in Gosa, is presently on active duty, and has continuously been so since the time of completion of his sentence. 6/ As a consequence

6/ In Gosa v. Mayden, the claimants had each been discharged from the military well before commencing their collateral attacks on their previous court-martial convictions. Neither one of them was on active duty at the time they filed suit. Indeed, so far as we can tell, in every federal decision suggesting that O'Callahan is not "retroactive," the petitioner, claimant or plaintiff was no longer in military service at the time the action was filed, and was mounting a truly "collateral" attack on the court-martial pro-

(continued next page)

of that status, the court-martial conviction has a continuing and direct impact upon the petitioner in his present military service. In that respect, the gravamen of petitioner's claim is not so much a collateral attack on a prior deprivation of rights, but a present attack on the continuing present effects of such deprivation.

The distinction is crucial in several respects. First, although petitioner's conviction was presumably "final" in the sense of Article 76, Uniform Code of Military Justice, 10 U.S.C. §876, the consequences of that military conviction have a direct and continuing daily effect upon petitioner's military service. Except for that conviction, both his rank and pay would be different today. If the assumption of court-martial jurisdiction over petitioner in 1963 was improper, he should be entitled to raise that claim presently, just as he presumably could challenge a present military decision to deny him some particular

ceedings. See Gross v. United States, supra; Augenblick v. United States, supra; Williams v. Froehlke, supra; Hooper v. Laird, 482 F.2d 794 (D.C. Cir. 1973); Lichtenstein v. Schlessinger, supra.

benefit because of that conviction.

Second, petitioner's continuing military service defines a limited area in which this Court might permit the retroactive application of O'Callahan without the potentially disruptive effect upon the military feared by the Gosa plurality, should O'Callahan be held retroactive with respect to all pre-1969 courts-martial. 413 U.S. at 683-85. Since few individuals who were subjected to court-martial jurisdiction for conduct lacking service connection are likely to have remained, as has petitioner, on continuous active duty, the practical impact upon the military of a decision holding O'Callahan retroactive, limited to those in petitioner's circumstances, would be minimal. 7/

7/ Distinctions between O'Callahan claims raised by those whose convictions were final and claims raised by those who suffer continuing adverse consequences in their military careers have an analog in the so-called "continuing claim" doctrine of the Court of Claims. That doctrine has been used to modify statutes of limitations barriers to suits in the Courts of Claims where claimant suffers a continuing wrong due to continuing service. See Lerner v. United States, 168 Ct. Cl. 247 (1964); Cosgriff v. United States, 181 Ct. Cl. 730, 387 F.2d 390 (1967). Just as the continuing consequences of a claimed wrong can override the interests in repose and finality which are safeguarded by the statute of limitations, so too should such continuing consequences override

(continued next page)

3. There is an additional factor which differentiates this case from Gosa v. Mayden. The plurality in Gosa carefully distinguished the situation where conduct was "constitutionally immune from punishment in any court," quoting from United States v. United States Coin and Currency, supra at 724, from its view of the issue presented in O'Callahan:

> In O'Callahan, on the other hand, the offense was one for which the defendant was not so immune in any court. The question was not whether O'Callahan could have been prosecuted; it was, instead, one related to the forum. 413 U.S. at 677.

In a very real sense, petitioner here was "constitutionally immune from punishment in any court" for his conduct. It was alleged in the petition, and demonstrated below, that petitioner would not, as a practical matter, have been prosecuted for any criminal offense by the state of Alaska for the conduct which was the basis of his court-martial conviction. Even if he had been prosecuted, moreover, it seems plain that the incriminating testimony

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the similar interests in finality which cause courts not to give retroactive effect to prior decisions.

of the woman supporting his court martial conviction would not have been admissible in the civilian courts, absent a waiver of Fifth Amendment rights. [8/] Finally, the relevant Alaska provision in effect at that time, Alaska Statutes, Section 11.40.010, treated adultery as a misdemeanor "punishable by a fine of not more than $200, or by imprisonment in a jail for not more than three months. (§65-9-1 ACLA 1949)." To the extent that petitiner's military punishment exceeded these limitations, he was subjected to penalties that could not have been imposed by the civilian courts at all. In these circumstances, if petitioner had not been punished for such conduct by the military, he would not have been punished for such conduct at all.

For these reasons, we urge that this Court consider the extent to which O'Callahan has retroactive application to the pre-1969 courts-

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8/ While the Gosa plurality asserts that the O'Callahan decision "was not based on any conviction that the court-martial lacks fundamental integrity in its truth determining process," 413 U.S. at 680-81, there is reason to question such "fundamental integrity" here, where constitutional safeguards might have prevented a conviction for the same offense in civilian courts.

martial of those who remain in active military service. Even if the plurality opinion of Gosa v. Mayden is accepted by a majority of the Court, we submit that the concerns and interests expressed in that opinion are less significant in this case, where peititoner has remained continuously in active military service, and where the conduct for which he was convicted by court-martial in 1963 was, in a practical sense, "constitutionally immune from punishment in any court."

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOEL M. GORA
c/o American Civil Liberties Union
22 East 40th Street
New York, New York 10016

EDWARD A. BRILL
1185 Avenue of the Americas
New York, New York 10036

ATTORNEYS FOR PETITIONER

February 21, 1978

APPENDIX

ORDER OF THE UNITED STATES COURT OF CLAIMS

Filed Nov 25 1977

IN THE UNITED STATES COURT OF CLAIMS

No. 179-75

MICHAEL B. STEARSMAN) Military pay; Courts-
) martial; Service-
v.) connection; Exhaustion
THE UNITED STATES) of Military Remedies;
Right of Privacy

Joel M. Gora, attorney of record, for plaintiff. Edward Brill and Poletti, Freidin, Prashker, Feldman & Gartner, of counsel.

Sandra P. Spooner, with whom was Assistant Attorney General Barbara Allen Babcock, for defendant. Julie P. Dubick, of counsel.

Before DAVIS, Judge, Presiding, KUNZIG and BENNETT, Judges.

O R D E R

Plaintiff is a non-commissioned officer with the Air Force and has been continuously in the Service since 1956. Early in 1963, then a Staff Sergeant stationed at Eielson Air Force Base in Alaska, he was convicted by court-martial of having had sexual intercourse with a married woman not his wife. The woman was the wife of another Air Force sergeant stationed at the Base (the sergeant

was a friend of plaintiff's), but the offense occurred at the other sergeant's house a considerable distance off the base. As a result of this court-martial conviction, plaintiff was (as finally determined) stripped of his sergeant's rank, reduced to the rank of Airman Basic, confined for five months and fourteen days, and compelled to forfeit pay and allowances during his confinement. After his return to duty late in 1963 he again rose through the ranks and at the time this case was submitted to the court he was either a Technical Sergeant or a Master Sergeant. The suit was brought on May 30, 1975, to collect back pay and other monies due as a result of the court-martial which was alleged to have been invalid and wrongful, and for other relief. Both parties have moved for summary judgment and the case has been argued orally.

Plaintiff's first point is that the court-martial was without jurisdiction because the off-the-base offense involving a civilian dependent of a serviceman was not service-connected, and therefore under O'Callahan v. Parker, 395 U.S. 258 (1969), could not have been tried by court-martial in 1963. This court has already rejected comparable arguments in Augenblick v. United States, 206 Ct.

Cl. 74, 509 F.2d 1157 (1975), cert. denied, 422 U.S. 1007 (1976), and Gross v. United States, 209 Ct. Cl. 70, 79-80, 531 F.2d 482, 488 (1976), and we see no significant differences here.

Plaintiff's second point is that his court-martial conviction on the charge of adultery violated his constitutional right of privacy which allegedly protects such sexuual conduct between consenting adults. The majority of the court (Judges Kunzig and Bennett) hold that plaintiff is barred from raising this point in this court because he failed to raise it in the military justice system, either at the court-martial or on review within the military system. See Schlesinger v. Councilman, 420 U.S. 738, 756-58 (1975); McKinney v. Warden, 273 F.2d 643, 644 (10th Cir. 1959), cert. denied, 363 U.S. 816 (1960); Harris v. Ciccone, 417 F.2d 479, 484 (8th Cir. 1969), cert. denied, 397 U.S. 1078 (1970). Accordingly, those judges do not reach or consider the merits of the issue. Judge Davis, believing that military counsel could not be expected in 1963 to raise this right-to-privacy argument which has only recently been articulated and developed (cf. Gross v. United States, supra, 209 Ct. Cl. 70, 75-76, 531 F.2d

at 486), would reach the merits of the point and reject it in the circumstances present here.[1/]

IT IS THEREFORE ORDERED AND CONCLUDED that plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and the petition is dismissed.

BY THE COURT

NOV 25 1977

Oscar H. Davis
Judge, Presiding

1/ The court-martial record shows that plaintiff and his partner in the adulterous act committed the act in the other sergeant's house, very near to his presence (he appeared to be sleeping on a nearby couch), and had a post-adultery conversation which was overheard by the sergeant. That sergeant worked on the same base as the plaintiff, and apparently the two were in frequent contact. In that particular set of circumstances, Judge Davis is of the view that plaintiff had no constitutional right-of-privacy protecting his adulterous act from military punishment. Cf. Lovisi v. Slayton, 539 F.2d 349 (4th Cir.), cert. denied, 429 U.S. 977 (1976).

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

RONALD R. GLANCZ,
MICHAEL KIMMEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The unpublished opinion of the Court of Claims (Pet. App. 1a-4a) is noted at 566 F.2d 1192.

JURISDICTION

The judgment of the Court of Claims was entered on November 25, 1977. The petition for a writ of certiorari was filed on February 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the commission of adultery by a staff sergeant with the wife of, and in the house of, another serviceman, constitutes a "service connected" offense.

2. Assuming petitioner's offense is not "service-connected" under *O'Callahan* v. *Parker*, 395 U.S. 258, whether *O'Callahan* should be applied retroactively.

STATUTE INVOLVED

Article 134, Uniform Code of Military Justice, 10 U.S.C. 934, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

STATEMENT

Petitioner is a non-commissioned officer with the Air Force, and has been continuously in that service since 1956. In early 1963 he was a Staff Sergeant stationed at an Air Force Base in Alaska. He was convicted in 1963 by court-martial under Article

134 of the Uniform Code of Military Justice (UCMS). That provision proscribes "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces * * *." 10 U.S.C. 934. The particular charge was that petitioner had engaged in sexual intercourse with the wife of another Air Force sergeant stationed at the base, in the house of the other sergeant, which was located off-base (Pet. App. 1a-2a).[1]

The court-martial record shows that petitioner and his partner committed the adulterous act in the other sergeant's house, while the latter was sleeping on a nearby couch. Afterwards, the wronged husband apparently awakened and overheard the adulterous pair conversing. The two sergeants worked at the same base and were apparently in frequent contact (Pet. App. 4a n.1).

As a result of the court-martial conviction, petitioner was stripped of his sergeant's rank, reduced to the rank of airman basic, confined for approximately five and a half months, and compelled to forfeit approximately two and a half months' pay and allowances (Pet. App. 2a). After petitioner's release from confinement and return to duty in late

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[1] Petitioner was also convicted by the same court-martial under Article 130, UCMJ, of unlawfully entering another's house (in January 1963) with intent to commit a criminal offense, *viz.* adultery with another married woman. However, this conviction was set aside on procedural grounds by the military review authority.

1963, however, he again rose through the ranks and is presently a Master Sergeant.[2]

Some six years later, after the decision of this Court in *O'Callahan* v. *Parker*, 395 U.S. 258, petitioner sought to have his 1963 conviction nullified on the ground that his offense was not "service connected" under the *O'Callahan* ruling. This request was denied by the Air Force. Petitioner filed this suit in the Court of Claims in May 1975, asserting that the offense for which he was convicted in 1963 was not service connected, and that *O'Callahan* should be applied retroactively to void that conviction. Petitioner sought back pay amounting to approximately $30,000,[3] and moved for summary judgment (Pet. App. 2a).

In January 1975, before petitioner filed this lawsuit, the Court of Claims had already ruled that *O'Callahan* was not retroactive, following the plurality opinion of this Court in *Gosa* v. *Mayden*, 413 U.S. 665. See *Augenblick* v. *United States*, 206 Ct. Cl. 74, 509 F.2d 1157, 1159-1160, certiorari denied, 422 U.S. 1007. In 1976 the Court of Claims adhered to this view in *Gross* v. *United States*, 209 Ct. Cl. 70, 79-80, 531 F.2d 482, 488.

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[2] The 1963 court-martial conviction also ordered a bad conduct discharge. However, the Air Force administratively remitted this penalty in 1964, permitting petitioner to continue in service, and to reenlist.

[3] This sum allegedly represents what petitioner would additionally have earned if he had not temporarily lost rank as a result of his conviction.

In view of the fact that the non-retroactivity of *O'Callahan* was plainly settled in the Court of Claims, the government cross-moved for summary judgment in petitioner's lawsuit, arguing only the non-retroactivity of *O'Callahan*. The government made no separate argument that petitioner's offense was in fact "service connected," but no concession was made that the offense was not "service connected."[4]

In a decision issued on November 25, 1977, the Court of Claims granted the government's motion for summary judgment. The court ruled (Pet. App. 2a-3a):

> Plaintiff's first point is that the court-martial was without jurisdiction because the off-the-base offense involving a civilian dependent of a serviceman was not service-connected, and therefore under *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), could not have been tried by court-martial in 1963. This court has already rejected comparable arguments in *Augenblick* v. *United States*, 206 Ct. Cl. 74, 509 F.2d 1157 (1975), *cert. denied*, 422 U.S. 1007 (1976), and *Gross* v. *United States*, 209 Ct. Cl. 70, 79-80, 531 F.2d 482, 488 (1976), and we see no significant differences here.[5]

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[4] For purposes of its argument on non-retroactivity of *O'Callahan* the government "assume[d] arguendo" that petitioner's offense was not service connected (Defendant's Cross-Motion for Summary Judgment, p. 8 n. 5).

[5] The Court of Claims also rejected petitioner's separate argument that the 1963 conviction violated his constitutional right of privacy (Pet. App. 3a-4a). Petitioner does not seek further review of this ruling (Pet. 7).

ARGUMENT

The decision of the Court of Claims is consistent with the ruling of this Court in *Gosa* v. *Mayden*, 413 U.S. 665, and with final rulings of the Court of Military Appeals and every court of appeals that has decided the question of retroactivity of *O'Callahan*. There is no present conflict among the lower federal courts on *O'Callahan's* retroactivity; hence there is no occasion for further review of that question by the Court at this time. Nor does this case present any basis for an "exception" to the rule of non-retroactivity of *O'Callahan*.

1. Preliminarily, it should be pointed out that there is a substantial argument that, in the particular circumstances of this case, the offense for which petitioner was convicted was indeed "service connected."

Petitioner points to cases where the Court of Military Appeals has ruled that sex offenses by servicemen occurring off-base, even where involving the dependent of another serviceman, are not service connected under *O'Callahan*. See *United States* v. *McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94; *United States* v. *Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313; *United States* v. *Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322. See Pet. 8 n. 4. But they are distinguishable. Those cases each involved serious civilian crimes committed off-base (statutory rape of a minor, sodomy between a serviceman and his stepson, and sexual acts with a child). The civilian authorities

have an obvious and important interest in prosecuting serious civilian offenses of this nature, have "traditionally prosecuted" such crimes, and undoubtedly will continue to do so. See *Relford* v. *Commandant*, 401 U.S. 355, 365. We agree that such prosecutions should be in the civilian courts, and that the normal rules of criminal procedure (including trial by jury) should apply.[6]

In the present case, on the other hand, the offense for which petitioner was convicted (adultery) hardly amounts to a "serious crime" under civilian law.[7] As petitioner observes, such an "offense" would probably not have been prosecuted at all by the State of Alaska (Pet. 15). Indeed, the military itself would probably not wish to prosecute in a case where a serviceman commits adultery with a woman having no connection with the service, and there is no adverse effect on the service. However, *this* case involves the commission of adultery with the wife of *another serviceman* attached to the same military base as the petitioner, and, moreover, in the other serviceman's own house, while he was present. In these unusual

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[6] See the concurring opinion of Judge Nichols in *Augenblick* v. *United States*, 206 Ct. Cl. 74, 509 F.2d 1157, 1163 ("[the military] interest in deterring [a serious offense by a soldier against a civilian] and [the military] interest in trying it are two different things").

[7] Cf. *United States* v. *Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (*O'Callahan* doctrine does not deprive military courts of jurisdiction to try offenses that would be dealt with as petty offenses in the civilian world, not requiring jury trial).

circumstances, the incident had a greater impact upon military than civilian interests. It was an offense affecting the military order, morale and working relationship of the two soldiers involved (and their military associates who knew of the offense). Both soldiers were attached to the same military base and were part of the same "military community." In these circumstances, petitioner's conduct was, we submit, appropriately dealt with as a violation of Article 134, which embraces "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces * * *." *Parker* v. *Levy*, 417 U.S. 733, 756; *Orloff* v. *Willoughby*, 345 U.S. 83, 94.[8]

2. Assuming arguendo that petitioner's offense was not "service connected," and could not today be punished by military courts-martial, the question arises whether *O'Callahan* should be applied retroactively. We adhere to the negative answer that we submitted in *Gosa* v. *Mayden*, 413 U.S. 665. In light of the full opinions by members of the Court in that case, it is unnecessary to repeat the arguments here.

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[8] "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker* v. *Levy*, *supra*, 417 U.S. at 756.

"The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94.

We stress that the lower federal courts are, at this time, in accord in holding that *O'Callahan* is not applicable to earlier courts-martial. See *Gosa* v. *Mayden*, 450 F.2d 753, 758 (C.A. 5), affirmed, 413 U.S. 665; *Hooper* v. *Laird*, 482 F.2d 784 (C.A. D.C.); *Lichtenstein* v. *Schlesinger*, 495 F.2d 1382 (C.A. 9); *Schlomann* v. *Moseley*, 457 F.2d 1223, 1226-1228 (C.A. 10), certiorari denied, 413 U.S. 919; *Augenblick* v. *United States*, 206 Ct. Cl. 74, 509 F.2d 1157, certiorari denied, 422 U.S. 1007; *Mercer* v. *Dillon*, 19 U.S. C.M.A. 264, 41 C.M.R. 264.[9] And we submit that until such time as a conflict of decisions should arise, this Court may appropriately forego considering the problem once again.

We do not appreciate the force of petitioner's argument that *O'Callahan* should be retroactive at least for those servicemen still in the service (Pet. 12-14). It seems to us that a serviceman who was in fact discharged as a result of a pre-*O'Callahan* court-martial—generally entailing a "bad conduct" or "dishoncrable" discharge—arguably has a greater, not a lesser, interest in retroactive application of *O'Callahan* than a soldier who, as here, was court-martialled but never discharged. Nor is it obvious why those who happen to be still in the service should receive

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[9] The contrary decision in *United States ex rel. Flemings* v. *Chafee*, 458 F.2d 544 (C.A. 2), was reversed *sub nom. Gosa* v. *Mayden*, 413 U.S. 665, on alternative grounds on nonretroactivity (4 justices) and service connection of the offense (3 justices). In *Williams* v. *Froehlke*, 490 F.2d 998, 1000-1001, the Second Circuit considered *Flemings* no longer controlling in that circuit on *O'Callahan* retroactivity.

more favorable treatment than those similarly situated who have meanwhile voluntarily decided to separate or retire. The fact that petitioner stayed in the service and is now at a relatively high level in the enlisted ranks demonstrates that his former conviction no longer has any adverse "impact upon * * * petitioner in his *present* military service" (Pet. 13).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

RONALD R. GLANCZ,
MICHAEL KIMMEL,
Attorneys.

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